pects the stewards had failed to observe the principles of natural justice, the proceedings before the committee constituted a hearing *de novo* and the defects in the stewards inquiry were thereby cured. The appellant appealed to the Privy Council, contending, *inter alia*, that the steward's decision was void and the committee had therefore no jurisdiction to entertain the appeal since it was a condition precedent of an appeal that there was a decision to appeal against, and that defects in the stewards' proceedings could not be cured merely by a fair hearing of his appeal by the committee."

It was held, *inter alia*, that there was no absolute rule that defects in natural justice at an original hearing could or could not be cured by appeal proceedings which had been correctly and fairly conducted. However, where a person had joined an organisation or body and was deemed, on the rules of that organisation and the contractual context in which he joined, to have agreed to accept what in the end was a fair decision, notwithstanding some initial defect, the task of the courts was to decide, in the light of the agreements made and having regard to the course of the proceedings, whether at the end of those proceedings there had been a fair result reached by fair methods. On the facts, those who took part in racing were deemed to have accepted the Rules of Racing and to be bound by the decisions of bodies set up under the rules, provided they received fair treatment and a consideration of their case on its merits. The appellant's case had received, overall, full and fair consideration and there was therefore no basis on which the court ought to interfere.

The same could be said of the inquiry held by the Industrial Court in this instance.

Accordingly, we hold that the workman was lawfully dismissed as was held by the Industrial Court. However, neither that court nor the High Court was correct in amending the date of dismissal and in awarding compensation as a consequence of such amended date, both matters outside their jurisdiction in an inquiry under section 20(3) of the Industrial Relations Act.

We would therefore allow the appeal, set aside the finding of the High Court and quash the award by the Industrial Court with regard to effective date of dismissal and backwages and orders consequential thereon. Costs to the appellant here and below. Deposit to be refunded.

Appeal allowed.

Solicitors: *Shook Lin & Bok; Lobo & Associates.*

TOH THEAM HOCK v. KEMAJUAN PERWIRA MANAGEMENT CORPORATION SDN. BHD.

[S.C. (Lee Hun Hoe C.J. (Borneo), Hashim Yeop A. Sani & Wan Hamzah S.C.JJ.) February 9 & April 27, 1987]

[Kuala Lumpur – Supreme Court Civil Appeal No. 192 of 1986]

Legal Profession – Solicitor – Solicitor receiving deposit in accordance with contract of sale – Whether holding as agent for vendor or as stakeholder – Whether vendor entitled to interest earned on deposits – Housing Developers (Control and Licensing) Rules 1970, Schedule C – Solicitors Accounts Rules 1967, r.2 – Legal Profession Act 1976, s.86(2).

The respondents were developers and vendors of houses built on their land and the appellant was the solicitor appointed by them. In the sale and purchase agreement between the respondents and various purchasers of the houses it was agreed that a sum equivalent to 5% of the purchase price be paid "to the vendor's solicitors or some other person or company authorised by the Controller as stakeholder" for payment to the vendor on production of the certificate of fitness for occupation of the building. The appellant received the deposits and kept them in his clients' account receiving interest therefor. The respondents brought an originating summons in the High Court asking for an order that the appellant deliver to the respondents a list of all monies which have accrued as interest on the 5% of the purchase money which had been retained by him in respect of the sale of certain houses. In respect of the houses for which certificates of fitness had been issued the total amount of deposits was paid to the respondents but not the interest earned on the deposits. The learned judge granted the application of the respondents holding that the appellant acted as the agent of the respondents and therefore as agent he was liable to account for whatever money he received for the respondents including interest. The appellant appealed.

Held, allowing the appeal: (1) the respondents had entered into sale and purchase agreements wherein they agreed to abide by the term of the agreements with regard to the 5% of the purchase price to be paid to their solicitors as stakeholder which was to be paid only on the production of the certificate of fitness for occupation of the premises. The respondents were not entitled to the deposit until the Certificate of Fitness was issued;

(2) the appellant cannot be held accountable to the respondents in respect of the interest on the deposits in each case up to the date of the issue of the Certificate of Fitness.

Cases referred to:

(1) *Sorrell* v. *Finch* [1977] A.C. 728.
(2) *Maloney* v. *Hardy* (1970) 216 E.G. 1582.
(3) *Burt* v. *Claude Cousins & Co. Ltd.* [1971] 2 Q.B. 426.
(4) *Potters* v. *Loppert* [1973] 1 All E.R. 658.

SUPREME COURT.

Lim Kean Chye (*M. Singaram* with him) for the appellants.

Lal Harcharan Singh (*Markiman bin Kobitan* with him) for the respondents.

Cur. Adv. Vult.

Hashim Yeop A. Sani S.C.J. (delivering the judgment of the court): The appellant is an advocate and solicitor and the respondents are a housing developer. The respondents retained the appellant as their solicitor on April 10, 1980. The respondents, as plaintiffs in the court below, went before the learned judge with an originating summons praying for an order that the appellant (defendant) deliver to the plaintiffs a list of all monies which have accrued as interest on the 5% of the purchase price which had been retained by him in respect of the sale of certain houses.

Before the learned judge it was common ground that:

(a) the defendant is an advocate and solicitor;

(b) the plaintiffs were the developers and vendors of houses built on land held under EMR Nos. 490, 355, 266, 492 and Grant No. 1481 for Lot Nos. 388, 371, 420, 353 and 419 respectively in the Mukim of Kamunting in the District of Laurt & Matang in the State of Perak;

(c) the defendant was appointed as solicitor acting for the plaintiff company.

It was not disputed that the 5% of the purchase price was retained by the appellant to be paid to the respondents as soon as the certificate of fitness was issued and that at some stage the certificate of fitness was in fact issued and the total amount of the deposit paid to the respondents. It was also not disputed that after the appellant refused to comply with the request of the respondents on the interest, the respondents discharged the appellant as their solicitor on November 9, 1983, and engaged in his place Messrs. Lee Beng Cheang & Co.

The learned judge granted the application of the respondents and in his grounds of judgment he said:

"Having considered the affidavits of both the plaintiffs and the defendant I am of the view that at all material times the defendant was acting as a solicitor for the plaintiff's company. He is an agent of the plaintiffs. It follows therefore that the money he received from the purchasers are held by him as an agent and not as a stakeholder."

In the earlier part of his judgment he said that as solicitor the defendant acted as an agent of the plaintiffs and the terms of the sale and purchase agreement did not change the fact that he was an agent. Therefore as agent he was liable to account for whatever money he received for the plaintiffs including interest.

The crux of the matter therefore is whether the appellant was a stakeholder or whether he was a solicitor acting for the plaintiffs at the time he received the 5% deposit of the purchase price.

A copy of the sale and purchase agreement between the respondents and the various purchasers of the houses is to be found at pages 32 – 44 of Vol. 2. Clause 3 of the agreement subjected the payments under the contract to such other methods of payment as may from time to time be allowed under the Housing Developers (Control and Licensing) Act 1966 and any rules and regulations made thereunder and paragraph (h)(ii) therein provided that a sum equivalent to 5% of the purchase price be paid "to the vendor's solicitors or some other person or company authorised by the Controller as stakeholder" for payment to the vendor on production of the Certificate of Fitness for Occupation, if any, to the said building. This clause is in fact a reproduction in substance of paragraph 1(h) of Schedule C to the Housing Developers (Control and Licensing) Rules 1970 on payment of instalments. The whole of paragraph 1(h) of the schedule reads as follows:

"(h) On delivery to the Purchaser of vacant possession of the housing accommodation and the land as provided in Rule 12(1)(o) or on completion of the transfer of the property as provided in Rule 12(1)(p) whichever shall first happen the balance of 10 per cent of the purchase price, 5 per cent of which shall forthwith be paid to the licensed housing developer and the remaining 5 per cent shall be paid to the licensed housing developer's solicitors or to such other person as may be approved by the Controller as stakeholders to be paid to the licensed housing developer *only* on production of the Certificate of Fitness for Occupation of the Appropriate Authority in respect of the housing accommodation."

In so far as concerned the respondents, the appellant was in a dual capacity during the material time. But in what capacity did he receive the deposit? The sale and purchase agreement and the schedule to the 1970 Rules would seem to show that he received the deposit as stakeholder. This is clear from the language used in both documents – "shall be paid to the licensed housing developer's solicitors or to such other person as may be approved by the Controller as stakeholders."

What is in essence stakeholding? The word "stake" is in common parlance used to apply to any money to be disposed of in accordance with what may happen in future: and whoever is in possession of the money is often described as a stakeholder. The manner in which the money is to be disposed of depends on the terms on which it is held.

In sale and purchase agreement cases the position is put clearly by Lord Edmund-Davies in *Sorrell* v. *Finch*[1] who repeated what was said in *Maloney* v. *Hardy*[2]:

"The essence of stakeholding in vendor and purchaser cases is that a binding contract of sale has been entered into and the intending purchaser deposits with a third party a sum to be held pending completion; meanwhile the third party holding that deposit may part with it to neither contracting party without the consent of the other ..."

In any particular case of sale and purchase, whether a person receiving the deposit is to be considered as an agent for the vendor or for the purchaser or for both as principal or as trustee is a question of law depending on the circumstances of the transaction as a whole. The learned judge concluded that in this case the appellant received the deposit as agent for the respondents in a fiduciary capacity and therefore on general principles he would be accountable.

In *Burt* v. *Claude Cousins & Co. Ltd.*[3] Lord Denning M.R. in his dissenting judgment explained the liability of an estate agent or solicitor receiving a deposit as a stakeholder which statement of the law was accepted by the House of Lords in *Sorrell* v. *Finch.*[1] He said:

"If an estate agent or solicitor, being duly authorised in that behalf, receives a deposit "as stakeholder," he is under a duty to hold it *in medio* pending the outcome of a future event. He does not hold it as agent for the vendor, nor as agent for the purchaser. He holds it as trustee for both to await the event: see *Skinner* v. *Trustee of Property of Reed* [(1967) 2 All E.R. 1286 at 1289], per Cross J. Until the event is known, it is his duty to keep it in his own hands; or to put it on deposit at the bank; in which case he is entitled to keep for himself any interest that accrues to it; see *Harington* v. *Hoggart* [(1830) 1 B. & Ad. 577]. If the purchaser should become entitled to the return of his deposit, he must sue the estate agent or solicitor for it: see *Eltham* v. *Kingsman* [(1818) 1 B. & Ad. 683] and *Hampden* v. *Walsh* [(1876) 1 Q.B.D. 189]. He cannot sue the vendor, because the vendor has never received it, or become entitled to receive it."

Pennycuick V.-C. in *Potters* v. *Loppert*[4] at page 661 considered the law in relation to contract deposits. Where money is placed *in medio* in the hands of a third party to await an event as between two other parties the third party receives that property as trustee and that the property and the investments for the time being representing it represent his trust estate. Certainly the money may be paid to the third party as trustee, but equally it may be paid to him as principal on a contractual or quasi-contractual obligation to pay the like sum to one or other of the parties according to the event. It must depend on the intention of the parties, to be derived from all the circumstances, including any written documents, in which capacity the third party receives the money.

In the present case no doubt the appellant was retained as solicitor by the respondents during the material period. In the absence of any agreement to the contrary it would be easy to conclude that the appellant would have received deposits on behalf of the respondents as their agent or trustee. But the respondents entered into a contract in the form of a sale and purchase agreement wherein the respondents agreed to abide by the terms of the agreement with regard to the 5% of the purchase price to be paid to their solicitors as stakeholder which was to be paid *only* on the production of a Certificate of Fitness for Occupation of the premises. This provision in the contract was also in compliance with the provision in the 1970 Rules. We do not think that the respondents should be allowed to resile from what they had contracted; and their instructions to the appellant to place the deposits into fixed deposit account should not under the circumstances be made binding on the appellant. It was a clear term of the contract that the respondents were not entitled to the deposit until the Certificate of Fitness was issued. The respondents as a party were not competent to unilaterally alter the terms of the contract.

The view that the appellant cannot be held accountable for the interest would also seem to be consistent with the notes on Rule 2 of the Solicitors' Accounts Rules, 1967 shown to us by Mr. Lim Kean Chye where the following appears:

"*Stakeholders*
Although Rule 2 of the Solicitors' Accounts Rules, 1967, lays down that for the purpose of those Rules money held by a solicitor as stakeholder is "client's money" and must be paid into a client account, in the Council's opinion (which is supported by the advice of Leading Counsel) when a solicitor holds money as a stakeholder the stake money does not belong to any specific client until the happening of the deciding event, and the solicitor can keep any interest earned thereon. Neither s.8 of the Solicitors Act, 1965, nor the Solicitors' Accounts (Deposit Interest) Rules, 1965, apply to it."

In our view the appellant cannot be held accountable to the respondents in respect of the interest on the deposits in each case up to the date of the issue of the Certificate of Fitness. The appeal is accordingly allowed with costs. Deposits to be returned to appellant.

Appeal allowed.

Solicitors: *Khong & Son; Abraham & Partners.*

MAMAT BIN DAUD & ORS. v. GOVERNMENT OF MALAYSIA

[S.C. (Salleh Abas L.P., Seah, Mohamed Azmi, Hashim Yeop A. Sani & Abdoolcader S.C.JJ.) October 13, 20, 29, 31 & November 5, 1987]

[Kuala Lumpur – Supreme Court Suit No. 1 of 1986]

Constitutional Law – Legislation – Whether s. 298A of Penal Code introduced by an amendment Act in 1983 is invalid as being ultra vires the Constitution – Whether section is in pith and substance a law on the subject of religion or of public order – Colourable legislation – Islamic law – Determination of matters of Islamic law or doctrine – Penal Code, ss. 295, 296, 297, 298 & 298A – Trengganu Administration of Islamic Law Enactment 1955, ss. 21(1), 88, 89, 142A, 142B & 149 – Federal Constitution, arts. 4(3) & (4), 11, 74, 77, 128(1)(a) & 9th Schedule.

In this case, each of the petitioners was charged for an offence under section 298A of the Penal Code for doing an act which is likely to prejudice unity among persons professing the Islamic religion. They were alleged to have acted as an unauthorised Bilal, Khatib and Imam at a Friday prayer in Kuala Terengganu without being so appointed under the Terengganu Administration of Islamic Law Enactment 1955. The issue before the court is whether the said section which was enacted by Parliament by an amending Act in 1983 is *ultra vires* Article 74(1) of the Federal Constitution, since the subject matter of the legislation is reserved for the State Legislatures and therefore beyond the legislative competency of Parliament. Leave was obtained for the petitioners to file a suit for declaratory orders to the effect that the new section 298A of the Penal Code is invalid on the ground that it makes provision with respect to a matter with respect to which Parliament has no power to make laws – see [1986] 2 M.L.J. 192.

It was contended by the petitioners that the law is invalid as being *ultra vires* the Constitution because, having regard to the pith and substance of the section, it is a law which ought to be passed not by Parliament but by State Legislative Assemblies, it being a legislation on Islamic religion, according to Article 11 clause (4) and item 1 of List II, Ninth Schedule of the Federal Constitution. The respondent on the other hand contended that the section is valid because it is a law passed by Parliament on the basis of public order, internal security and also criminal law according to Article 11 clause (5) and items (3) and (4) of List I of the Ninth Schedule of the Federal Constitution.

Held, by a majority (Hashim Yeop A. Sani and Abdoolcader S.C.JJ. dissenting): (1) having considered and examined the provisions of section 298A of the Penal Code as a whole, it is a colourable legislation in that it pretends to be a legislation on public order, when in pith and substance it is a law on the subject of religion with respect to which only the states have power to legislate under Articles 74 and 77 of the Federal Constitution;

(2) there must be a declaration that section 298A of the Penal Code is a law with respect to which Parliament has no power to make law and a declaration that section 298A of the Penal Code is invalid and therefore null and void and of no effect;

(3) the ruling shall not apply to the Federal Territories of Kuala Lumpur and Labuan and is to take effect from the date of the order, that is October 13, 1987.

[*Editorial Note:* At the end of the hearing on October 13, 1987, the Supreme Court, by a majority, allowed the application (Salleh Abas L.P., Seah & Mohamed Azmi S.C.JJ.). The Lord President gave his judgment on October 31 and Seah and Mohamed Azmi S.C.JJ. gave their joint judgment on October 29, 1987. Hashim Yeop A. Sani S.C.J. gave his dissenting judgment on November 5, 1987 and Abdoolcader S.C.J. on October 20, 1987.]

Cases referred to:

(1) *Navinchandra* v. *Commissioner of Income Tax, Bombay City* A.I.R. 1955 S.C. 58, 61.
(2) *K.C.G. Narayan Deo* v. *State of Orissa* A.I.R. 1953 S.C. 375, 379.
(3) *Attorney-General for Ontario* v. *Reciprocal Insurers* [1924] A.C. 328.
(4) *East Union (M) Sdn. Bhd.* v. *Government of the State of Johore & Anor.* [1980] 2 M.L.J. 143.
(5) *Stephen Kalong Ningkan* v. *Tun Abang Openg & Tawi Sli (No. 2)* [1967] 1 M.L.J. 46, 49.
(6) *Abdul Karim bin Abdul Ghani* v. *Legislative Assembly of State of Sabah*, S.C. Civil Application No. 21 of 1987.
(7) *Attorney-General for Ontario & Ors.* v. *Canada Temperance Federation & Ors.* [1946] A.C. 193.
(8) *Canadian Federation of Agriculture* v. *Attorney-General for Quebec & Ors.* [1951] A.C. 179.
(9) *Regina* v. *Harrold* (1971) 19 D.L.R. (3d) 471.
(10) *Gallagher* v. *Lynn* [1937] A.C. 863.
(11) *Prafulla Kumar Mukherjee* v. *Bank of Commerce Ltd., Khulna* (1947) 74 I.A. 23; A.I.R. 1947 P.C. 60.
(12) *State of Bombay* v. *Narottamdas* A.I.R. 1951 S.C. 69, 96.
(13) *B.R. Shankaranarayana* v. *State of Mysore* A.I.R. 1966 S.C. 1571.
(14) *Russell* v. *The Queen* (1882) 7 App. Cas. 829, 839-840.
(15) *Hodge* v. *The Queen* (1883) 9 App. Cas. 117, 130.
(16) *Gibbons* v. *Ogden* (1824) 22 U.S. 1, 90.